Unemployment insurance

Backgrounder

BP-191E

UNEMPLOYMENT INSURANCE: RECENT DECISIONS INVOLVING THE ACT AND THE CHARTER

JEAN-DANIEL BÉLANGER
LAW AND GOVERNMENT DIVISION

FEBRUARY 1989

Library of Parliament
Bibliothèque du Parlement

Research Branch

The Research Branch of the Library of Parliament works exclusively for Parliament, conducting research and providing information for Committees and Members of the Senate and the House of Commons. This service is extended without partisan bias in such forms as Reports, Background Papers and Issue Reviews. Research Officers in the Branch are also available for personal consultations in their respective fields of expertise.

Cat. No. YM32-2/191E
ISBN 0-660-13296-6

CE DOCUMENT EST AUSSI
PUBLIÉ EN FRANÇAIS

TABLE OF CONTENTS

CANADA

LIBRARY OF PARLIAMENT
BIBLIOTHÈQUE DU PARLEMENT

UNEMPLOYMENT INSURANCE: RECENT DECISIONS INVOLVING THE ACT AND THE CHARTER

INTRODUCTION

More and more frequently, the Canadian Charter of Rights and Freedoms included in the Constitution Act, 1982 is applied in a wide variety of areas, showing that, regardless of the issue in dispute, it is truly the supreme law in our country.

Two 1988 Federal Court decisions, one handed down in the Trial Division, the other in the Court of Appeal, used the Charter to declare unconstitutional certain provisions of the Unemployment Insurance Act, 1971 (S.C. 1970-71-72, Chap. 48). In addition to applying to concrete situations which arise quite frequently today, these decisions reflect society's changing attitudes toward parents who remain at home and the elderly.

THE SCHACHTER CASE: BENEFITS FOR NATURAL FATHERS REMAINING AT HOME*

On 7 June 1988, Judge Strayer of the Federal Court of Canada Trial Division, handed down a decision in favour of a man who applied for unemployment insurance benefits while he was taking care of his newborn infant at home. The judge concluded that contrary treatment under the Unemployment Insurance Act, 1971 would constitute discrimination of the sort prohibited by the Charter.

---

* 88 C.L.L.C. 12099.

A. The Facts

The second child of the plaintiff, Mr. Shalom Schachter, and his wife, was born on 28 July 1985. Mrs. Schachter had claimed maternity benefits, which she received for the period from 28 July to 29 November 1985. The couple had agreed that the father would also stay at home after the birth to take care of the newborn and the first child, so as to enable the mother to go back to work as soon as possible.

On 2 August 1985, Mr. Schachter filed both an application for maternity benefits and an application for paternity benefits granted in the case of adoption. He explained in the first application that his aim was to share his wife's entitlement to 15 weeks of benefits. He subsequently amended his second application, stating that it was discriminatory and contrary to the Charter that, as a natural father, he was not entitled to the same paternity benefits as adoptive fathers.

On 17 September 1985, the Canada Employment and Immigration Commission informed Mr. Schachter that he was not entitled to the unemployment insurance benefits he claimed since he had left his job to assume primary responsibility for child rearing, and this was not a valid reason for leaving his employment and applying for benefits. Mr. Schachter appealed this decision to a board of referees, according to the procedure set out in the Unemployment Insurance Act, 1971. The board dismissed the appeal on 29 November 1985 and Mr. Schachter then appealed this decision to the Umpire, the final appeal level under the Act.

In a letter dated 22 October 1986, the Office of the Umpire informed Mr. Schachter of a controversy relating to whether umpires had jurisdiction over constitutional matters and advised him to commence an action for a declaration before the Trial Division of the Federal Court, to clarify the issue.

On that day, Mr. Schachter filed an application with the Federal Court to have the sections of the Unemployment Insurance Act, 1971 which restrict the right of natural fathers to receive unemployment insurance benefits declared discriminatory, contrary to section 15 of the Charter and inoperative. Mr. Schachter contested the right of natural mothers to receive maternity benefits while they are at home with their

newborn children, when natural fathers do not have an equivalent right. In addition, he contested the right of adoptive fathers to receive paternity benefits without restriction, while natural fathers could receive paternity benefits only in very specific cases (the death of the mother during delivery, for example).

B. The Decision

Judge Strayer, seized with the case, asked the following questions: Was there a denial of the equal benefit of the law? Was there discrimination? If so, what remedy could be ordered?

1. Inequality of Benefit

After reviewing the trends in case law involving the interpretation of section 15 of the Charter and criteria for establishing the existence of discrimination, the judge examined the first issue. Section 15(1) of the Charter provided that:

> Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Applying the criteria set out by the Federal Court of Appeal in Smith, Kline & French Laboratories Ltd. v. Canada [1987] 2 F.C. 359, the judge examined the case at issue. The following questions had to be answered: were the distinctions established with respect to the various groups by the law contrary prima facie to section 15 of the Charter? Did inequality exist between the various treatments provided in the law for each group? Was this inequality of treatment so significant that it amounted to discrimination?

The judge quickly rejected the argument that there was inequality of treatment based on sex because maternity benefits are provided only to women. He explained that the benefits payable under section 30 of the Act are only paid because of a woman's pregnancy and her personal health. Since natural mothers may choose to receive the 15 weeks

of benefits either before or after the birth of the child, maternity benefits are not for the purpose of allowing mothers to remain at home to take care of the newborn child. In addition, since section 30 requires the woman to "prove her pregnancy" in order to receive benefits, men are not eligible and sexual discrimination is not involved, since it is the woman's state which makes her eligible for benefits, not her sex.

The judge went on to say, however, that if maternity benefits were given to the mother so that she could take care of the child and not so that she would get well, there was a strong likelihood that the father's exclusion would be contrary to the principle of sexual equality explicitly protected by the Charter. Citing the report prepared by the Parliamentary Committee on Equality Rights, the judge mentioned that the distinction made with regard to natural mothers - that they should be the only ones to take care of their children - perpetuates stereotypes about parental roles, and section 32 does not make this distinction with regard to adoptive parents.

In fact, section 32 of the Act enables either of the adoptive parents, according to their wishes, to claim up to 15 weeks of benefits while he or she remains at home after the arrival of the adopted child. Judge Strayer listed the goals leading to the passing of this provision. Pointing out that it is of great social importance that one of the parents, regardless of sex, is able to spend some time with the adopted child, so that the child feels welcomed by his new family, he was astonished that the same principle does not apply in the case of a natural parent and the care to be given to a newborn infant. Therefore, in his opinion, flagrant inequality is created by the distinction made in the Unemployment Insurance Act, 1971 between adoptive parents and natural parents.

In order to highlight this inequality, Judge Strayer reviewed public policies involving leave granted to parents for the birth or adoption of a child. He pointed out first of all that in general the values of Canadian society clearly promote equality between parents with regard to taking care of their children. He noted that the federal government itself recognized this principle with the passing in 1984 of an amendment to the Canada Labour Code which requires employers under its

jurisdiction to grant a leave of absence of up to 24 weeks to either parent following the birth of a child, and to guarantee that he or she may resume his or her former position upon return to work. Although this provision does not force the employer to pay the employee for such leave, it is unrelated to the employee's sex. Similarly, in Manitoba, the legislation involving minimum employment standards allows natural fathers to obtain paternity leave of up to six weeks, concurrently with the maternity leave of up to 17 weeks which must be granted to mothers; adoption leave of 17 weeks may also be granted to an employee, regardless of sex. Finally, in Saskatchewan, the law provides for maternity leave of 18 weeks, paternity leave of six weeks and adoption leave of six weeks for either of the adoptive parents.

On the international level, Canada has recognized the principle of parental equality. Judge Strayer cites the Declaration on the Elimination of Discrimination Against Women proclaimed by the General Assembly of the United Nations on 7 November 1967, and the International Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the United Nations on 18 December 1979, and ratified by Canada on 10 December 1981. These documents state that parents must have equal rights and duties in matters relating to their children, and that countries must ensure that parents are provided with the necessary social services to enable them to combine family obligations with work responsibilities. These provisions reinforce the view, according to Judge Strayer, that Canadian society is committed to equalizing the role of parents in the care of children.

On this point, the judge concluded that the Unemployment Insurance Act, 1971 does create a distinction between adoptive parents and natural parents, which results in an inequality of benefit under the law, within the scope of section 15 of the Charter.

2. Is there Discrimination?

According to Judge Strayer, for a law to be found to be contrary to the Charter, it is not sufficient that there be inequality of treatment with regard to an individual or a group, but this inequality must result in discrimination that has negative or substantially disadvantageous effects.

Section 32 of the Unemployment Insurance Act, 1971 makes it possible for either one of the parents, if he or she is otherwise eligible for benefits, to claim up to 15 weeks of benefits when an adopted child arrives in the home. Therefore, if both parents are working, in principle at least, the adoptive father has an equal opportunity and, implicitly, an equal responsibility with the adoptive mother to take leave to care for the child at home. The Act denies this opportunity to natural fathers, and also denies the opportunity for natural parents to decide who will look after the newborn infant. These distinctions created by the law, which are substantially disadvantageous to natural parents, cannot be justified except on the basis of the inherent differences between natural fathers and adoptive fathers.

On this point, Judge Strayer rejected the evidence of the Commission's expert witness brought forward to show that adopted children need special care because of the psychological problems they experience and that these needs justify the distinctions made in the Act. He did, however, retain the evidence provided by Mr. Schachter's expert, that there is no reason to make a distinction between natural and adoptive parents, for the most important concern is to ensure that a positive relationship is established as early as possible between both parents and the newcomer to the family.

Judge Strayer felt that he was supported in his decision by earlier statements by informed observers. In 1985, the Parliamentary Committee on Equality Rights, in its report entitled Equality for All, pointed out that the Act was contrary to section 15 of the Charter with regard to natural fathers, and that natural parents should be eligible for the same benefits as adoptive parents. In 1986, the Royal Commission of Inquiry on Unemployment Insurance, the Forget Commission, recommended that "parental benefits" be set up and made available to natural and adoptive parents. In the same year, the Canadian Human Rights Commission had even suggested that the federal government provide higher benefits that would completely replace the income of the parent who took leave in order to look after his or her child, with a view to respecting the commitment made when the international convention mentioned above was ratified; these benefits

would of course be available to both natural and adoptive parents. Finally, just before Mr. Schachter brought his case to the Federal Court, the Canadian Human Rights Commission informed him that, in the Commission's opinion, the Act was discriminatory in this regard.

Judge Strayer concluded that the denial of unemployment insurance benefits to natural fathers creates unfair discrimination contrary to section 15 of the Charter, according to the criteria laid out in the Smith, Kline & French Laboratories Ltd. v. Canada decision.

3. Redress

Under section 24 of the Charter, a judge who concludes that a situation is contrary to the Charter may grant such remedy as he considers appropriate in the circumstances. In this case, Judge Strayer issued a declaration rendering eligible for unemployment insurance benefits those natural fathers who meet all the other eligibility criteria mentioned in the Act and who desire to stay home to look after their newborn infant. The benefits may be received for up to 15 weeks if it is shown that it is reasonable for the natural father to stay at home when the newborn arrives and the mother is not also receiving benefits to take care of the child. Maternity benefits granted to natural mothers must not be viewed as being provided because of the care required by the infant but rather because of the original objective - the mother's health during and after her pregnancy; they must, therefore, remain separate from the benefits paid for taking care of the newborn. Those benefits, however, must also be paid to the mother if she can show that it is reasonable for her to stay home to take care of her child and the father is not applying for these benefits; the natural mother should not be declared ineligible simply because she was previously entitled to maternity benefits. According to the judge, this declaration and all these details were designed to ensure that new inequalities were not created between the parents.

Regarding Mr. Schachter's case, the Commission erred in refusing to consider his application for benefits simply because he had decided to remain at home to look after his infant. The Commission should review Mr. Schachter's application and decide whether it was reasonable for him to leave his employment to take care of his child.

The effect of the decision was mitigated, however, because the judge ordered that the judgment be suspended pending an appeal, so as to enable legislative action to be taken to remedy the situation if the appeal does not succeed. A notice of appeal was in fact filed by the Attorney General on 5 October 1988, in accordance with the Rules of the Federal Court of Canada.

According to remarks made by the Minister of State for Employment and Immigration in October 1988, it appears that the government is favourably disposed to widening eligibility for unemployment insurance benefits to natural parents when both parents are working. However, again according to the Minister, this cannot be done if Judge Strayer's decision remains unchanged and becomes binding, thereby setting a precedent. This is probably why the federal government has appealed, and during this period it will attempt to find acceptable and feasible legislative solutions.

THE TÉTREAULT-GADOURY CASE: BENEFITS FOR WORKERS 65 YEARS OF AGE AND OVER*

On 23 September 1988, the Federal Court of Appeal ruled that the provisions in the Act preventing those aged 65 and older from obtaining unemployment insurance benefits were contrary to the Charter because they discriminated on the basis of age. This decision is all the more important since, given the superior level of the court which issued it, its grounds may provide the basis for a new trend in case law.

The decision was even more predictable than in the Schachter case. A number of other courts of justice, including the British Columbia Court of Appeal, had issued similar decisions with regard to other legislation. In addition, comments in the parliamentary reports mentioned in the Schachter case supported such a point of view, well before the Federal Court of Appeal handed down its unanimous decision involving Mrs. Tétreault-Gadoury.

---

* 88 C.L.L.C. 12270.

A. The Facts

The applicant was born on 8 September 1921 and on 8 September 1986, was therefore 65 years old. She had worked throughout her life, but on 19 September 1986, a few days after her birthday, she lost her job. Since she had paid unemployment insurance premiums while she was employed, she filed an application for benefits pursuant to the Unemployment Insurance Act, 1971 on 22 September 1986. She met all the other conditions set by the Act, except for being 65 years old. Under the Act, persons aged 65 years and over were automatically barred from receiving unemployment insurance benefits.

On 14 October 1986, the Employment and Immigration Commission informed Mrs. Tétreault-Gadoury that she was no longer entitled to receive unemployment insurance benefits because of her age and that the Act provided only for a special retirement benefit amounting to three weeks of benefits.

Mrs. Tétreault-Gadoury appealed this decision to a board of referees. At the hearing, she stated that she received $481 per month in pension benefits. She also stated that she was actively looking for work. She maintained that the provisions of the Act were contrary to the Canadian Charter of Rights because they were discriminatory. Without rendering any decision on the constitutional matter, the board of referees denied her appeal and upheld the Commission's decision.

Using an unusual approach, but one that is nonetheless permissible, Mrs. Tétreault-Gadoury has decided to ask that the decision of the board of referees be reviewed by application to the Federal Court of Appeal. This application to review and set aside the decision pursuant to section 28 of the Federal Court Act is not an appeal and is subject to specific eligibility criteria. The procedure has the advantage, however, of bringing the case immediately before superior court, and avoiding having to make a number of challenges before reaching this level. In addition, Mrs. Tétreault-Gadoury in this way circumvented the controversy over the jurisdiction of umpires with regard to the application of the Charter, which Judge Strayer referred to in the Schachter case. The Federal Court of Appeal ruled on this controversy in the first part of the reasons for its decision in this case.

B. The Decision

1. Umpires and Boards of Referees in Light of the Charter

The Supreme Court of Canada established in 1985 that courts and administrative tribunals can rule on whether an Act is valid under the Constitution and that "the overriding effect of the Constitution Act, 1982, section 52(1), is to give the Court not only the power, but the duty, to regard the inconsistent statute, to the extent of the inconsistency, as being no longer "of force or effect" (R. v. Big M Drug Mart Ltd., (1985) 1 S.C.R. 295, at page 353). However, the courts specializing in unemployment insurance were until very recently divided on the issue of their jurisdiction over constitutional matters.

The Federal Court of Appeal used the first 16 pages of its decision to settle the matter. It had dealt with the issue in an earlier decision (Zwarich v. Attorney General of Canada, (1987) 3 F.C. 253), but it took advantage of its different composition in the case at bar to reiterate and clarify its reasoning. Since the purpose of this study is not to discuss administrative and constitutional law, but rather to review the effect of the Charter on the Unemployment Insurance Act, 1971, we will deal only with the Court's conclusions involving the competence of umpires and boards of referees in light of the Charter.

According to the Unemployment Insurance Act, 1971, which sets out and defines the jurisdiction of umpires and boards of referees, they may decide any question of law or fact necessary for the disposition of an appeal brought before them. This means that boards of referees, which are the first appeal level, have the competence to decide not only on questions confined to the provisions of the Unemployment Insurance Act, 1971, and its regulations, but also on questions relating to any other Act whose validity they are called upon to decide. Judge Lacombe, writing for the Court, went on to say that if an administrative tribunal has jurisdiction under its enabling Act to rule on a question of law, it does not lose that jurisdiction because the question of law to be decided involves constitutional considerations. Deciding that a provision of the Act is of no force or effect because it is inconsistent with the Charter

is a question of law like any other which boards of referees have to decide.

In addition, boards of referees may deal with a question of law even if not all of their members have legal training. A board of referees consists of three people: a representative of the employer and a representative of the employees, who are chosen by the Commission, and a lawyer who acts as Chairman and who is appointed by the Governor in Council. As long as procedural rules are followed, every person should have the opportunity to invoke the rights guaranteed by the Charter before a tribunal set up to hear his objections. The usual procedure for objection to the decisions of the Commission is an appeal to a board of referees, then to an umpire. According to the Court, the right to be heard by each and every one of these tribunals includes the right to present arguments effectively regarding the supremacy of the Constitution of Canada.

The Court ended by saying that the power to refuse to give effect to a legislative or regulatory provision found to be unconstitutional is inherent in any body exercising the power of adjudication between the rights of parties in a particular instance. The courts of appeal in British Columbia and Quebec had already made similar decisions regarding other administrative tribunals.

The board of referees accordingly erred in law in refusing to consider the constitutional arguments submitted to it by Mrs. Tétreault-Gadoury.

2. Background of Section 31 of the Act

Judge Lacombe, writing for the Court, got to the heart of the matter by citing the pertinent sections of the Act, including section 31(1):

> Notwithstanding section 19, a benefit period shall not be established for a claimant if at the time he makes an initial claim for benefit he is sixty-five years of age or over.

He began his examination by reviewing the measures which led to the inclusion of this provision in the Act. It was following the appearance of government pension plans in 1965 that questions arose about

the right of retired persons to receive unemployment insurance benefits. Under the Canada Pension Plan and the Quebec Pension Plan, a person who had attained the age of 70 years, or a person 65 years old who had retired became eligible for a pension or retirement annuity if he had paid premiums while he was working. Commissions of inquiry were created to study the possible overlapping of the State's social programs and submitted reports to the federal government.

These reports led to the publication of a white paper called Unemployment Insurance in the 1970s, tabled in the House of Commons by the government in 1970, preceding the adoption of the new Unemployment Insurance Act in June 1971. Under section 31, a claimant became ineligible for benefits if he was 70 years of age or over or if he was already entitled to receive a government pension or annuity. The underlying philosophy was that the persons covered by this new provision should no longer be regarded as forming part of the active population. Older persons who had left the labour market were regarded as abusing the unemployment insurance scheme and receiving an unfair proportion of benefits to add to their pension incomes. Section 31 was designed to help remedy such abuses.

Section 31 of the Act was amended in 1975 (S.C. 1974-75, Chap. 80), making any claimant over the age of 65 ineligible for benefits. At the same time, government pension plans were adjusted to enable recipients to receive their pension at 65 years of age, regardless of their employed or retired status.

In 1986, the government went so far as to reduce the amount of unemployment insurance benefits when the individuals were receiving a pension from a private or government plan, generally between the ages of 55 and 65. Since 5 January 1986, by an amendment to section 57 of the Regulations (SOR/86-58), the Commission must, in fact, reduce the amount of benefits by the amount of the pension received by the claimant. Only if he has started to work again and has been contributing long enough to be eligible again for unemployment insurance benefits will he receive the full amount of benefits in his next period of unemployment without deductions being made for pensions paid to him since he retired from his first job.

(This rule came into effect on 5 April 1987; it also presupposes that the claimant is under 65).

Since the early 1980s, a number of committees have recommended the abolition of ineligibility for unemployment insurance benefits on account of age. The Court mentions the Report of the Task Force on Unemployment Insurance in the 1980s, published in 1981, the 1986 report of the Forget Commission, and the 1987 report of the Parliamentary Standing Committee on Labour, Employment and Immigration. The Court might also have added the second report of the Standing Committee on Human Rights, Human Rights and Aging in Canada, published in August 1988. However, in a formal ministerial statement given in the House of Commons on 15 May 1987, the federal government decided to maintain the status quo, keeping section 31 of the Act in its present form.

3. Section 31 and the Charter

At this point, the Court again took up Mrs. Tétreault-Gadoury's argument that section 31 of the Act discriminates against her in that, solely because of her age, it subjects her to treatment that is less advantageous than that granted to claimants under 65 years of age. Without giving the reasons for its decisions, the Court stated that Mrs. Tétreault-Gadoury has successfully shown that section 31 of the Act infringes her right to equality guaranteed by section 15 of the Charter. It added that the burden was now on the Attorney General of Canada to show that this infringement is justified in accordance with the provisions of section 1 of the Charter, which reads:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Court reviewed the facts and applicable case law, in comparison with the case of claimants less than 65 years old in the same situation. Judge Lacombe mentioned that Mrs. Tétreault-Gadoury had accumulated 26 weeks of insurable employment, which entitled her to a minimum of 25 weeks of unemployment insurance benefits. However, because

of section 31, she was deprived of the protection against unemployment afforded to other unemployed people.

The Court rejected the argument of the Federal Court that Mrs. Tétreault-Gadoury was not disadvantaged by the loss of her right to unemployment insurance because there were many compensatory mechanisms available under social assistance provisions for people 65 years of age and over, such as old age pensions, government pension plans, additional tax exemptions, and the program of free medication made available to these persons by the Government of Quebec. The Court stated that these measures are available to all - workers, the unemployed, and retired persons, - and are not related to employment; there is no social assistance measure which offsets the loss of employment for those aged 65 and over. All the measures mentioned are provided in order to lighten the burden of those who reach 65 years of age, regardless of their situation or the social class to which they belong.

According to the Court, the most harmful aspect of section 31 is to deprive the applicant and any other person of her age of the status of being insured against unemployment, even though she is still looking for employment. Instead, she is made a pensioner of the state, without regard for her personal skills and situation. The Court went on to say that the applicant is stigmatized as belonging to the group of persons who are no longer part of the active population; the Act perpetuates the stereotype that a person who is 65 years or older who loses his job can no longer be retrained for the labour market and must become the complete responsibility of the State. In our society, is this reasonable or justifiable?

In answer to this question, the Court gave an eight-page account that was extremely negative with regard to section 31. It pointed out that the initial objective of the Act, which was completely valid, was to deny the right to benefits of retired people who were receiving a pension, so as to avoid double compensation from government programs. However, the Court had difficulty reconciling this objective with the current wording of the Act. In fact, since 1975, there has been no distinction between those who retire from the labour market and those who

remain active: when they reach 65 years of age, all lose the right to unemployment insurance.

The Federal Court of Appeal concluded that section 31 is discriminatory, arbitrary and inequitable. It felt that this provision gives no consideration to personal needs and specific individual circumstances, because it is modelled on historical prejudices against older workers. Section 31 denies absolutely and without distinction the benefit of the law to unemployed persons aged 65 years and over. There is a clear disproportion, stated the Court, between the desired objective and the means provided by section 31, which has draconian effects on all those to whom it applies indiscriminately. Under section 15 of the Charter, all have the right to equal protection and equal benefit of the law, independent of discrimination based on age.

For all these reasons, the Court allowed Mrs. Tétreault-Gadoury's application, quashed the decision of the board of referees and referred the matter back to the board to be decided by it again on the assumption that section 31 of the Unemployment Insurance Act, 1971 is inconsistent with section 15 of the Charter and accordingly of no force or effect.

The government has now asked the Supreme Court for leave to appeal this ruling. A decision will be handed down at a future date.

CONCLUSION

As shown by the two decisions examined here, the government's unemployment insurance system will have to be amended so that it respects the rights guaranteed by the Charter. Judge Strayer mentioned that in his opinion it was of little importance how much money was required to ensure parental equality. The Federal Court of Appeal ruled that stereotypes about aging must not be perpetuated. These decisions reflect the move in Canadian society toward greater respect for human rights, which will make it possible, among other things, to ensure greater equity in the payment of unemployment insurance benefits.

Background Paper

BP-191E

UNEMPLOYMENT INSURANCE: DECISIONS INVOLVING THE ACT AND THE CHARTER

Jean-Daniel Bélanger
Marilyn Pilon
Law and Government Division

January 1989
Revised September 1992

Library of Parliament
Bibliothèque du Parlement

Research Branch

The Research Branch of the Library of Parliament works exclusively for Parliament, conducting research and providing information for Committees and Members of the Senate and the House of Commons. This service is extended without partisan bias in such forms as Reports, Background Papers and Issue Reviews. Research Officers in the Branch are also available for personal consultation in their respective fields of expertise.

Available in Canada through
your local bookseller
or by mail from
Canada Communication Group -- Publishing
Ottawa, Canada K1A 0S9

Catalogue No. YM32-2/191-1992-09E
ISBN 0-660-14909-5

CE DOCUMENT EST AUSSI PUBLIÉ EN FRANÇAIS

TABLE OF CONTENTS

CANADA

LIBRARY OF PARLIAMENT
BIBLIOTHÈQUE DU PARLEMENT

UNEMPLOYMENT INSURANCE: DECISIONS INVOLVING THE ACT AND THE CHARTER

INTRODUCTION

More and more frequently, the *Canadian Charter of Rights and Freedoms* included in the *Constitution Act, 1982* is applied in a wide variety of areas, showing that, regardless of the issue in dispute, it is truly the supreme law in our country.

Two 1988 Federal Court decisions, one handed down in the Trial Division, the other in the Court of Appeal, used the Charter to declare unconstitutional certain provisions of the *Unemployment Insurance Act, 1971* (S.C. 1970-71-72, Chap. 48). In addition to applying to concrete situations that arise quite frequently today, these decisions reflect society's changing attitudes toward parents who remain at home and the elderly.

THE SCHACHTER CASE: BENEFITS FOR NATURAL FATHERS REMAINING AT HOME*

On 7 June 1988, Judge Strayer of the Federal Court of Canada Trial Division, handed down a decision in favour of a man who applied for unemployment insurance benefits while he was taking care of his newborn infant at home. The judge concluded that contrary treatment under the *Unemployment Insurance Act, 1971* would constitute discrimination of the sort prohibited by the Charter.

---

* **88 C.L.L.C. 12099.**

A. The Facts

The second child of the plaintiff, Mr. Shalom Schachter, and his wife, was born on 28 July 1985. Mrs. Schachter had claimed maternity benefits, which she received for the period from 28 July to 29 November 1985. The couple had agreed that the father would also stay at home after the birth to take care of the newborn and the first child, so as to enable the mother to go back to work as soon as possible.

On 2 August 1985, Mr. Schachter filed both an application for maternity benefits and an application for paternity benefits granted in the case of adoption. He explained in the first application that his aim was to share his wife's entitlement to 15 weeks of benefits. He subsequently amended his second application, stating that it was discriminatory and contrary to the Charter that, as a natural father, he was not entitled to the same paternity benefits as adoptive fathers.

On 17 September 1985, the Canada Employment and Immigration Commission informed Mr. Schachter that he was not entitled to the unemployment insurance benefits he claimed since he had left his job to assume primary responsibility for child rearing, and this was not a valid reason for leaving his employment and applying for benefits. Mr. Schachter appealed this decision to a board of referees, according to the procedure set out in the *Unemployment Insurance Act, 1971*. The board dismissed the appeal on 29 November 1985 and Mr. Schachter then appealed this decision to the Umpire, the final appeal level under the Act.

In a letter dated 22 October 1986, the Office of the Umpire informed Mr. Schachter of a controversy relating to whether umpires had jurisdiction over constitutional matters and advised him to commence an action for a declaration before the Trial Division of the Federal Court, to clarify the issue.

On that day, Mr. Schachter filed an application with the Federal Court to have the sections of the *Unemployment Insurance Act, 1971* which restrict the right of natural fathers to receive unemployment insurance benefits declared discriminatory, contrary to section 15 of the Charter and inoperative. Mr. Schachter contested the right of natural mothers to receive maternity benefits while they are at home with their newborn children, when natural fathers do not have an equivalent right. In addition, he contested the right of adoptive fathers to receive

paternity benefits without restriction, while natural fathers could receive paternity benefits only in very specific cases (the death of the mother during delivery, for example).

B. The Decision

Judge Strayer, seized with the case, asked the following questions: Was there a denial of the equal benefit of the law? Was there discrimination? If so, what remedy could be ordered?

1. Inequality of Benefit

After reviewing the trends in case law involving the interpretation of section 15 of the Charter and criteria for establishing the existence of discrimination, the judge examined the first issue. Section 15(1) of the Charter provides that:

> Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Applying the criteria set out by the Federal Court of Appeal in *Smith, Kline & French Laboratories Ltd.* v. *Canada*, [1987] 2 F.C. 359, the judge examined the case at issue. The following questions had to be answered: were the distinctions established with respect to the various groups by the law contrary *prima facie* to section 15 of the Charter? Did inequality exist between the various treatments provided in the law for each group? Was this inequality of treatment so significant that it amounted to discrimination?

The judge quickly rejected the argument that there was inequality of treatment based on sex because maternity benefits are provided only to women. He explained that the benefits payable under section 30 of the Act are only paid because of a woman's pregnancy and her personal health. Since natural mothers may choose to receive the 15 weeks of benefits either before or after the birth of the child, maternity benefits are not for the purpose of allowing mothers to remain at home to take care of the newborn child. In addition, since section 30 requires the woman to "prove her pregnancy" in order to receive benefits, men are not eligible

and sexual discrimination is not involved, since it is the woman's state which makes her eligible for benefits, not her sex.

The judge went on to say, however, that if maternity benefits were given to the mother so that she could take care of the child and not so that she would get well, there was a strong likelihood that the father's exclusion would be contrary to the principle of sexual equality explicitly protected by the Charter. Citing the report prepared by the Parliamentary Committee on Equality Rights, the judge mentioned that the distinction made with regard to natural mothers - implying that they should be the only ones to take care of their children - perpetuated stereotypes about parental roles, and section 32 did not make this distinction with regard to adoptive parents.

In fact, section 32 of the Act enabled either of the adoptive parents, according to their wishes, to claim up to 15 weeks of benefits while he or she remained at home after the arrival of the adopted child. Judge Strayer listed the goals leading to the passing of this provision. Pointing out that it is of great social importance that one of the parents, regardless of sex, is able to spend some time with the adopted child, so that such children feel welcomed by their new family, he was astonished that the same principle did not apply in the case of a natural parent caring for a newborn infant. Therefore, in his opinion, flagrant inequality was created by the distinction made in the *Unemployment Insurance Act, 1971* between adoptive parents and natural parents.

In order to highlight this inequality, Judge Strayer reviewed public policies involving leave granted to parents for the birth or adoption of a child. He pointed out first of all that in general the values of Canadian society clearly promote equality between parents with regard to taking care of their children. He noted that the federal government itself had recognized this principle with the passing in 1984 of an amendment to the Canada Labour Code which required employers under its jurisdiction to grant a leave of absence of up to 24 weeks to either parent following the birth of a child, and to guarantee that he or she could resume his or her former position upon return to work. Although this provision did not force the employer to pay the employee for such leave, it was unrelated to the employee's sex. Similarly, in Manitoba, the legislation involving minimum employment standards allows natural fathers to obtain paternity leave of up to six weeks, concurrently with the maternity leave of up to

17 weeks which must be granted to mothers; adoption leave of 17 weeks may also be granted to an employee, regardless of sex. Finally, in Saskatchewan, the law provides for maternity leave of 18 weeks, paternity leave of six weeks and adoption leave of six weeks for either of the adoptive parents.

On the international level, Canada has recognized the principle of parental equality. Judge Strayer cites the *Declaration on the Elimination of Discrimination Against Women* proclaimed by the General Assembly of the United Nations on 7 November 1967, and the *International Convention on the Elimination of All Forms of Discrimination Against Women*, adopted by the United Nations on 18 December 1979, and ratified by Canada on 10 December 1981. These documents state that parents must have equal rights and duties in matters relating to their children, and that countries must ensure that parents are provided with the necessary social services to enable them to combine family obligations with work responsibilities. These provisions reinforce the view, according to Judge Strayer, that Canadian society is committed to equalizing the role of parents in the care of children.

On this point, the judge concluded that the *Unemployment Insurance Act, 1971* created a distinction between adoptive parents and natural parents, which resulted in an inequality of benefit under the law, within the scope of section 15 of the Charter.

2. Was there Discrimination?

According to Judge Strayer, for a law to be found to be contrary to the Charter, it is not sufficient that there be inequality of treatment with regard to an individual or a group, but this inequality must result in discrimination that has negative or substantially disadvantageous effects.

Section 32 of the *Unemployment Insurance Act, 1971* made it possible for either one of the parents, if he or she was otherwise eligible for benefits, to claim up to 15 weeks of benefits when an adopted child arrived in the home. Therefore, if both parents were working, in principle at least, the adoptive father had an equal opportunity and, implicitly, an equal responsibility with the adoptive mother to take leave to care for the child at home. The Act denied this opportunity to natural fathers, and also denied the opportunity for natural parents to decide who would look after the newborn infant. These distinctions created by the law, which

were substantially disadvantageous to natural parents, could not be justified except on the basis of the inherent differences between natural fathers and adoptive fathers.

On this point, Judge Strayer rejected the evidence of the Commission's expert witness brought forward to show that adopted children need special care because of the psychological problems they experience and that these needs justify the distinctions made in the Act. He did, however, retain the evidence provided by Mr. Schachter's expert, that there is no reason to make a distinction between natural and adoptive parents, for the most important concern is to ensure that a positive relationship is established as early as possible between both parents and the newcomer to the family.

Judge Strayer felt that he was supported in his decision by the earlier statements of informed observers. In 1985, the Parliamentary Committee on Equality Rights, in its report entitled *Equality for All*, pointed out that the Act was contrary to section 15 of the Charter with regard to natural fathers, and that natural parents should be eligible for the same benefits as adoptive parents. In 1986, the Royal Commission of Inquiry on Unemployment Insurance, the Forget Commission, recommended that "parental benefits" be set up and made available to natural and adoptive parents. In the same year, the Canadian Human Rights Commission had even suggested that the federal government provide higher benefits that would completely replace the income of the parent who took leave in order to look after his or her child, with a view to respecting the commitment made when the international convention mentioned above was ratified; such benefits would of course be available to both natural and adoptive parents. Finally, just before Mr. Schachter brought his case to the Federal Court, the Canadian Human Rights Commission informed him that, in the Commission's opinion, the Act was discriminatory in this regard.

Judge Strayer concluded that the denial of unemployment insurance benefits to natural fathers created unfair discrimination contrary to section 15 of the Charter, according to the criteria laid out in the *Smith, Kline & French Laboratories Ltd.* v. *Canada* decision.

3. Redress

Under section 24 of the Charter, a judge who concludes that a situation is contrary to the Charter may grant such remedy as he or she considers appropriate in the circumstances.

In this case, Judge Strayer issued a declaration rendering eligible for unemployment insurance benefits those natural fathers who met all the other eligibility criteria mentioned in the Act and who desired to stay home to look after their newborn infant. The benefits would be received for up to 15 weeks if it were shown that it was reasonable for the natural father to stay at home when the newborn arrived and if the mother was not also receiving benefits to take care of the child. Maternity benefits granted to natural mothers should not be viewed as provided because of the care required by the infant but rather because of the original objective - the mother's health during and after her pregnancy; they must, therefore, remain separate from the benefits paid for taking care of the newborn. Those benefits, however, must also be paid to the mother if she can show that it is reasonable for her to stay home to take care of her child and the father is not applying for these benefits; the natural mother should not be declared ineligible simply because she was previously entitled to maternity benefits. According to the judge, this declaration and all these details were designed to ensure that new inequalities were not created between the parents.

Regarding Mr. Schachter's case, the Commission erred in refusing to consider his application for benefits simply because he had decided to remain at home to look after his infant. The Commission should review Mr. Schachter's application and decide whether it was reasonable for him to leave his employment to take care of his child.

The effect of the decision was mitigated, however, because the judge ordered that the judgment be suspended pending an appeal, so as to enable remedial legislative action to be taken if the appeal did not succeed. A notice of appeal was in fact filed by the Attorney General on 5 October 1988, in accordance with the *Rules of the Federal Court of Canada*.

C. The Appeals

1. Federal Court of Appeal

The federal government conceded that the legislation constituted an infringement of section 15 equality rights under the Charter and appealed solely on the jurisdiction of the trial judge to order an extension of unemployment insurance benefits. On 16 February 1990, a two-thirds majority of the Federal Court of Appeal upheld the decision of the trial judge, Justice

Mahoney dissenting, and found that even though Justice Strayer's decision would result in the appropriation of funds not authorized by Parliament, it was permissible as the only remedy that was "appropriate and just."

2. Supreme Court of Canada

That decision was successfully appealed to the Supreme Court of Canada on the same remedy issue. On 9 July 1992, the Court agreed with Mr. Justice Mahoney and held that where legislation is found to be in violation of the Charter, the appropriate remedy is to strike down the offending provision under section 52(2) of the Charter. Although in appropriate circumstances a court might sever or "read down" the offending provision, in this case the better course would have been a declaration of invalidity, suspended to allow amendments to the legislation that would meet constitutional requirements.

D. Legislative Response

On 1 June 1989, well before the Federal Court of Appeal decision, the federal government introduced Bill C-21 containing amendments to address the inequalities identified in the *Schachter* case. In provisions which came into force on 18 November 1990, 10 weeks of unemployment insurance benefits are now available to biological as well as adoptive parents for the purpose of caring for a claimant's newborn or adopted child. Biological mothers are still entitled to 15 weeks of pregnancy benefits, identified by Justice Strayer as necessary for and in response to their needs related to child-bearing, as opposed to child-rearing.

THE TÉTREAULT-GADOURY CASE: BENEFITS FOR WORKERS 65 YEARS OF AGE AND OVER[**]

On 23 September 1988, the Federal Court of Appeal ruled that the provisions in the Act preventing those aged 65 and older from obtaining unemployment insurance benefits were contrary to the Charter because they discriminated on the basis of age.

** **88 C.L.L.C. 12270.**

The decision was even more predictable than in the Schachter case. A number of other courts of justice, including the British Columbia Court of Appeal, had issued similar decisions with regard to other legislation. In addition, comments in the parliamentary reports mentioned in the Schachter case supported such a point of view, well before the Federal Court of Appeal handed down its unanimous decision involving Mrs. Tétreault-Gadoury.

A. The Facts

The applicant was born on 8 September 1921 and on 8 September 1986 was therefore 65 years old. She had worked throughout her adult life, but on 19 September 1986, a few days after her birthday, she lost her job. Since she had paid unemployment insurance premiums while she was employed, she filed an application for benefits pursuant to the *Unemployment Insurance Act, 1971* on 22 September 1986. She met all the other conditions set by the Act, except for being 65 years old. Under the Act, persons aged 65 years and over were automatically barred from receiving unemployment insurance benefits.

On 14 October 1986, the Employment and Immigration Commission informed Mrs. Tétreault-Gadoury that she was no longer entitled to receive unemployment insurance benefits because of her age and that the Act provided only for a special retirement benefit amounting to three weeks of benefits.

Mrs. Tétreault-Gadoury appealed this decision to a board of referees. At the hearing, she stated that she received $481 per month in pension benefits. She also stated that she was actively looking for work. She maintained that the provisions of the Act were contrary to the *Canadian Charter of Rights* because they were discriminatory. Without rendering any decision on the constitutional matter, the board of referees denied her appeal and upheld the Commission's decision.

Using an unusual approach, Mrs. Tétreault-Gadoury applied to have the decision of the board of referees reviewed by the Federal Court of Appeal. This application to review and set aside the decision pursuant to section 28 of the *Federal Court Act* is not an appeal and is subject to specific eligibility criteria. The procedure has the advantage, however, of bringing the case immediately before superior court, without having to make a number of challenges

before reaching this level. In this way, Mrs. Tétreault-Gadoury attempted to circumvent the controversy over the jurisdiction of umpires with regard to the application of the Charter, which Judge Strayer referred to in the Schachter case. The Federal Court of Appeal ruled on this controversy in the first part of the reasons for its decision in this case.

B. The Federal Court of Appeal Decision

1. Umpires and Boards of Referees in Light of the Charter

In 1985, the Supreme Court of Canada said that "if a court or tribunal finds any statute inconsistent with the Constitution, the overriding effect of the *Constitution Act, 1982*, section 52(1), is to give the Court not only the power, but the duty, to regard the inconsistent statute, to the extent of the inconsistency, as being no longer of force or effect" (*R.* v. *Big M Drug Mart Ltd.*, (1985) 1 S.C.R. 295, at page 353). Notwithstanding that decision, courts specializing in unemployment insurance cases continued to be divided on the issue of their jurisdiction over constitutional matters.

The Federal Court of Appeal used the first 16 pages of its decision in an attempt to settle the matter. It had dealt with the issue in an earlier decision (*Zwarich* v. *Attorney General of Canada*, (1987) 3 F.C. 253), but it took advantage of its different composition in the case at bar to reiterate and clarify its reasoning.

According to Lacombe J., because the *Unemployment Insurance Act, 1971* did not specifically limit the jurisdiction of umpires and boards of referees, both could decide any question of law or fact necessary for the disposition of an appeal brought before them. This meant that boards of referees, which are the first appeal level, had the competence to decide not only on questions confined to the provisions of the *Unemployment Insurance Act, 1971*, and its regulations, but also on questions relating to any other Act whose validity they might be called upon to decide. Judge Lacombe, writing for the Court, went on to say that if an administrative tribunal has jurisdiction under its enabling Act to rule on a question of law, it does not lose that jurisdiction because the question of law to be decided involves constitutional considerations. Deciding that a provision of the Act is of no force or effect because it is inconsistent with the Charter is a question of law like any other which boards of referees have to decide. According

to the Court, the right to be heard by each and every one of these tribunals includes the right to present arguments effectively regarding the supremacy of the Constitution of Canada.

The Court ended by saying that the power to refuse to give effect to a legislative or regulatory provision found to be unconstitutional is inherent in any body exercising the power of adjudication between the rights of parties in a particular instance. The courts of appeal in British Columbia and Quebec had already made similar decisions regarding other administrative tribunals.

The board of referees had accordingly erred in law in refusing to consider the constitutional arguments submitted to it by Mrs. Tétreault-Gadoury.

2. Background of Section 31 of the Act

Judge Lacombe, writing for the Court, went to the heart of the matter by citing the pertinent sections of the Act, including section 31(1):

> Notwithstanding section 19, a benefit period shall not be established for a claimant if at the time he makes an initial claim for benefit he is sixty-five years of age or over.

He began his examination by reviewing the measures which led to the inclusion of this provision in the Act. It was following the appearance of government pension plans in 1965 that questions arose about the right of retired persons to receive unemployment insurance benefits. Under the Canada Pension Plan and the Quebec Pension Plan, a person who had attained the age of 70 years, or a person 65 years old who had retired became eligible for a pension or retirement annuity if he had paid premiums while he was working. Commissions of inquiry were created to study the possible overlapping of the State's social programs and submitted reports to the federal government.

These reports led to the publication of a white paper called *Unemployment Insurance in the 1970s*, tabled in the House of Commons by the government in 1970, preceding the adoption of the new *Unemployment Insurance Act* in June 1971. Under section 31, a claimant became ineligible for benefits if he was 70 years of age or over or if he was already entitled to receive a government pension or annuity. The underlying philosophy was that the persons covered by this new provision should no longer be regarded as forming part of the

active population. Older persons who had left the labour market were regarded as abusing the unemployment insurance scheme and receiving an unfair proportion of benefits to add to their pension incomes. Section 31 was designed to help remedy such abuses.

Section 31 of the Act was amended in 1975 (S.C. 1974-75, Chap. 80), making any claimant over the age of 65 ineligible for benefits. At the same time, government pension plans were adjusted to enable recipients to receive their pension at 65 years of age, regardless of their employed or retired status.

In 1986, the government went so far as to reduce the amount of unemployment insurance benefits for individuals, generally between the ages of 55 and 65, who were receiving a pension from a private or government plan. Since 5 January 1986, by an amendment to section 57 of the Regulations (SOR/86-58), the Commission must, in fact, reduce the amount of benefits by the amount of the pension received by the claimant. Only if he has started to work again and has been contributing long enough to be eligible again for unemployment insurance benefits will he receive the full amount of benefits in his next period of unemployment without deductions for pensions paid to him since he retired from his first job. (This rule came into effect on 5 April 1987; it also presupposes that the claimant is under 65).

Since the early 1980s, a number of committees had recommended the abolition of ineligibility for unemployment insurance benefits on account of age. The Court mentioned the *Report of the Task Force on Unemployment Insurance in the 1980s*, published in 1981, the 1986 report of the Forget Commission, and the 1987 report of the Parliamentary Standing Committee on Labour, Employment and Immigration. The Court might also have added the second report of the Standing Committee on Human Rights, *Human Rights and Aging in Canada*, published in August 1988. However, in a formal ministerial statement given in the House of Commons on 15 May 1987, the federal government decided to maintain the *status quo*, keeping section 31 of the Act in its present form.

3. Section 31 and the Charter

At this point, the Court again took up Mrs. Tétreault-Gadoury's argument that section 31 of the Act discriminated against her in that, solely because of her age, it subjected her to treatment less advantageous than that granted to claimants under 65 years of age. Without

giving the reasons for its decisions, the Court stated that Mrs. Tétreault-Gadoury had successfully shown that section 31 of the Act infringed her right to equality guaranteed by section 15 of the Charter. It added that the burden next fell on the Attorney General of Canada to show that this infringement was justified in accordance with the provisions of section 1 of the Charter, which reads:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Court reviewed the facts and applicable case law, in comparison with the case of claimants less than 65 years old in the same situation. Judge Lacombe mentioned that Mrs. Tétreault-Gadoury had accumulated 26 weeks of insurable employment, which entitled her to a minimum of 25 weeks of unemployment insurance benefits. However, because of section 31, she was deprived of the protection against unemployment afforded to other unemployed people.

The Court rejected the argument that Mrs. Tétreault-Gadoury was not disadvantaged by the loss of her right to unemployment insurance because there were many compensatory mechanisms available under social assistance provisions for people 65 years of age and over, such as old age pensions, government pension plans, additional tax exemptions, and the program of free medication made available to these persons by the Government of Quebec. The Court stated that these measures were available to all - workers, the unemployed, and retired persons, - and were not related to employment; there was no social assistance measure which offset the loss of employment for those aged 65 and over. All the measures mentioned were provided in order to lighten burdens for those who reach 65 years of age, regardless of their situation or the social class to which they belong.

According to the Court, the most harmful aspect of section 31 was to deprive the applicant and any other person of her age of insurance against unemployment, even though she was still looking for employment. Instead, she was made a pensioner of the state, without regard for her personal skills and situation. The Court went on to say that the applicant was stigmatized as belonging to the group of persons who are no longer part of the active population; the Act perpetuated the stereotype that a person who is 65 years or older who loses a job can

no longer be retrained for the labour market and must become the complete responsibility of the State. In our society, is this reasonable or justifiable?

In answer to this question, the Court gave an eight-page account that was extremely negative with regard to section 31. It pointed out that the initial objective of the Act, which was completely valid, was to deny the right to benefits of retired people who were receiving a pension, so as to avoid double compensation from government programs. However, the Court had difficulty reconciling this objective with the current wording of the Act. In fact, since 1975, there had been no distinction between those who retired from the labour market and those who remained active upon reaching 65 years of age, all lost the right to unemployment insurance.

The Federal Court of Appeal concluded that section 31 was discriminatory, arbitrary and inequitable. It felt that this provision gave no consideration to personal needs and specific individual circumstances, because it was modelled on historical prejudices against older workers. Section 31 denied absolutely and without distinction the benefit of the law to unemployed persons aged 65 years and over. There was a clear disproportion, stated the Court, between the desired objective and the means provided by section 31, which had draconian effects on all those to whom it applied indiscriminately. Under section 15 of the Charter, all have the right to equal protection and equal benefit of the law, independent of discrimination based on age.

For all these reasons, the Court allowed Mrs. Tétreault-Gadoury's application, quashed the decision of the board of referees and referred the matter back to the board to be decided by it again on the assumption that section 31 of the *Unemployment Insurance Act, 1971* is inconsistent with section 15 of the Charter and accordingly of no force or effect.

C. The Supreme Court of Canada Decision

1. Section 31 and the Charter

The Supreme Court of Canada upheld the Federal Court of Appeal's finding that section 31 violated section 15 of the Charter by denying benefits to applicants on the basis of their age. Without conceding that section 31 was rationally connected to government objectives,

the Supreme Court concluded that those objectives could have been achieved through less intrusive means. Because section 31 did not impair equality rights as little as possible, it could not be justified under section 1.

2. Umpires and Boards of Referees in Light of the Charter

In contrast, the Supreme Court of Canada disagreed with the Federal Court of Appeal's view of the jurisdiction of boards of referees. Because the legislation did not give the boards "explicit authority" to determine questions of law, but specifically granted such authority to umpires, the Court held that the board of referees had no jurisdiction to determine whether section 31 of the *Unemployment Insurance Act, 1971* violated section 15 of the Charter. By conferring that jurisdiction on federally appointed judges sitting as umpires, the legislation had retained for litigants the advantage of having their constitutional questions addressed, within the administrative process, by those with specialized expertise in the field.

Because that decision meant that the Federal Court had been without jurisdiction to make a final determination on the constitutional question, the Supreme Court was obliged to allow the Commission's appeal. In order not to be left without a remedy, Mrs. Tétreault-Gadoury was advised to appeal the board of referees' decision to the umpire, who was empowered to cure any difficulties respecting the statutory time limits.

D. Legislative Response

As a result of amendments included in Bill C-21, the offending provision of the *Unemployment Insurance Act, 1971* was repealed retroactive to the 23 September 1988 decision of the Federal Court of Appeal. However, as was pointed out by the Supreme Court, a ruling on the section 15 Charter issue remained important for Mrs. Tétreault-Gadoury and others like her who had turned 65 prior to that date.

CONCLUSION

As a result of the two cases examined here, the unemployment insurance scheme has been amended to acknowledge section 15 equality rights guaranteed by the Charter. Both decisions reflect the move in Canadian society toward a greater respect for human rights, which has made it possible to ensure greater equity in the payment of benefits.

ACCO®

ACCOPRESS™MMC

YELLOW	25070	JAUNE
*BLACK	25071	NOIR*
*BLUE	25072	BLEU*
RL. BLUE	25073	RL. BLEU
*GREY	25074	GRIS*
GREEN	25075	VERT
RUST	25078	ROUILLE
EX RED	25079	ROUGE

ACCO CANADA INC.
WILLOWDALE, ONTARIO

* INDICATES 75% RECYCLED 25% POST-CONSUMER FIBRE

*SIGNIFIE 75 % FIBRES RECYCLÉES, 25 % DÉCHETS DE CONSOMMATION

BALANCE OF PRODUCTS 25% RECYCLED

AUTRES PRODUITS: 25 % FIBRES RECYCLÉES


0 50505 25072 1